United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1204-1296 ORIGINAL

NO. 74-1204..1296

To be argued by
DORON COHEN

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P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

COALITION FOR EDUCATION IN DISTRICT ONE, et al.,

Plaintiffs-Appellees,

-against-

THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York.

APPELLANTS' BRIEF

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TABLE OF CONTENTS

Cases Cited

Page

Statutes Cited

Other Authorities

TABLE OF CONTENTS

Cases Cited

Page

Statutes Cited

Other Authorities

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Statement

This is an appeal from an order of the District Court, Southern District (STEWART, J.,) from an application for a preliminary injunction dated January 11, 1974 and subsequent orders dated February 1, and March 4, 1974, which declared (1) as invalid the May 1, 1973 election in Community School District One, (2) The positions on the School board be vacated and (3) that a special election be held within the District and (4) the procedures to be followed upon said election.

Issues Presented

1. Was the election in Community School District One, held on May 1, 1973, effectively discriminatory against Puerto Ricans, Black and Chinese voters and

2. Was the degree of proof adduced upon the hear-

ing for a preliminary injunction sufficient to warrant the drastic relief granted by the District Court.

Facts

The action herein, having originally reached the hearing stage on a motion for a preliminary injunction, challenged the legality of the Community School Board election held in Community School District One, Manhattan, on May 1, 1973. Pursuant to New York Education Law § 2590-c, elections were held in each of the thirty-two community school districts within the City of New York on May 1, 1973. Every regularly registered voter residing in a community school district and every parent of a child attending any school under the jurisdiction of the community board of such district who is a citizen of the state, a resident of the City of New York for at least ninety days and at least twenty-one years of age is eligible to vote at the election for the members of such community school board.[1]

District One is located on the Lower East Side of Manhattan. It is an area of varied and diverse ethnic groups. Census figures indicate that between 55 and 60% of the residents of District One are white. Approximately

1. New York State Education Law § 2590-c. 3.

41.4% of the residents of District One are Puerto Rican and Black.

The majority of the resident population of the District is therefore white. The public school population in District One is over 90% Puerto Rican, black, and Oriental. Community School District One has experienced a great deal of racial and ethnic tension and hostility in regard to the administration of its public schools, which has been widely publicized in both the press and the media. The controversy has centered around the Community Superintendent, Mr. Luis Fuentes (T. 382-396)

In preparation for the May 1st school board elections the defendant New York City Board of Elections instituted unprecedented procedures to guarantee the registration of minority voters. Additionally, materials for the election itself were prepared in several languages in order to reflect the ethnic composition of the District. Spanish speaking as well as Chinese interpreters were provided on election day. (A. 167) (T. 490, 500, 508)[2]

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2 Numbers in parentheses preceded by the letter A refer to pages of the Appendix.
Numbers in parentheses preceded by the letter T refer to pages of the transcript which is not part of the Appendix.

The rate of pre-election registration, including parent registration, was high in District One and the proportion of voter turnout was more than twice the city-wide average and was the second highest of all thirty-two community school districts within the City of New York. Additionally, and in part due to the extensive efforts employed to educate and inform the voters of the District instituted by various community organizations and the defendants Board of Elections and Board of Education, the percentage of invalid ballots[3] cast was lower than the average for the borough of Manhattan (A. 269) and slightly higher than the city-wide average.[4]

The results of the election in Community School District One were made public in early May, 1973. Six members of the faction commonly identified as being opposed to Mr. Fuentes' continuance as Community Superintendent (5 whites and 1 black) and three members of the faction commonly identified as supporters of Mr. Fuentes (2 Hispanics

3. An invalid ballot is defined in § 2590-c6(12) of the New York State Education Law as a ballot that "does not clearly show which candidate the voter prefers to all others or if it contains the signature of the voter"...
4. This is a District which has a significant population that can neither read nor write English and the relatively low percentage of invalid ballots is therefore even more significant.

and 1 black) were elected to membership on the school board.[4a] This newly elected school board took office on July 1, 1973.

Plaintiffs, claiming to represent a coalition of community residents, parents, defeated candidates and the three members of the elected board identified with plaintiffs' political persuasion[5] commenced this action on or about October 1, 1973 by service of a summons and complaint alleging that numerous actions and omissions of the defendants resulted in the election being held in a racially discriminatory manner. Plaintiffs sought a judgment declaring the May 1 election invalid and ordering a new school board election in District One. At the conclusion of an extensive evidentiary hearing on plaintiffs' motion for a preliminary injunction the parties stipulated that the hearing should constitute a full hearing on the merits of the plaintiffs' claim as to the election.

[4a] Mr. Fuentes was appointed Community Superintendent on July 19, 1972 by a vote of the community school board then in office, see Matter of DiMauro 12 Ed. Dept. Rep. 284 (1973). It should be noted that "[b]y July of 1972, only four of the [nine] persons originally elected [in the 1970 school board elections] still held office. The other five members served by appointment of the Board as it existed from time to time," Roher v. Dinkins 32 NY 2d 180, 184 (1973). See also Mercado v. Scribner 38 AD 2d 444 (1972) affd. 30 NY 2d 871. The originally elected nine man school board had appointed a different superintendent (Carl Erdberg), see Valdivieso v. Community School Board of District One, 67 Misc. 2d 1007 (1970). See, generally, T.353-368, A.80-101 (Exhibits "A" through "E" appear at A.81-101. Exhibits "F" through "K" were inadvertently ommitted from the Appendix).

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[5] Georginna Hoggard, Henry Ramos, and Lyle Brown

ARGUMENT

(1)

The record below does not support the findings by the District Court that the procedures employed on May 1, in District One, resulted in an election in which minority voters' rights were impaired to a substantial degree.

An analysis of the decision of the Court below indicates that a racially discriminatory impact resulted from essentially two types of conduct:

(a) That which was a departure from statutes or established administrative procedure and had a discriminatory impact on minority voters and

(b) Conduct which was not on its face illegal or irregular, but which had a discriminatory impact on minority voters, and which was not explained or justified by the defendants. In addition, there were incidents of intentional racial discrimination by employees or agents of the defendants. (A 168)

(a)

The decision below concludes that several polling places serving predominently minority voters

opened substantially later than 6 A.M. This was caused by the late arrival either of the voting materials, including ballots or ballot boxes or of the full compliment of inspectors. (A169-170). The Court below concludes that this irregularity had a discriminatory impact upon minority voters. Said conclusion is clearly erroneous. Testimony adduced at the hearing indicates that there were over 3,550,000 people eligible to vote in the 32 community school board districts on May 1, 1973 in the City of New York. (T.658-9). And that in an operation of such magnitude late arrival of materials and absence of inspectors is inevitable. In fact, these are problems that are prevalent in every election held in the City of New York as well as elsewhere; (T.617-618, 653).

With regard to District One the Court supports this finding by pointing to P. S. 61 and P. S. 160 as polling places servicing predominately minority voters having opened between an hour and a half to two hours late due to the delay in arrival of materials. The Court has failed to point to the late opening of polling

sights in predominately white election districts, i.e. P.S. 63* (T. 487) P.S. 134* (T.529). These factors indicate that late opening of polling places equally affected areas servicing white as well as non-white voters and can in no way be deemed to have had a racially discriminatory impact upon any particular group of voters.

The decision below indicates that the most serious denial of the right to vote occurred at JHS 71 and the Emmanuel Presbyterian Church. The Court concludes that at JHS 71 parent voter materials (buff-cards) did not arrive at all and therefore all 83 registered parent voters (of whom 83% were Spanish or Chinese surname) did not have the opportunity to vote (A.170). The only testimony in this regard came from a witness who examined the parent buff-cards for JHS 71, after the election, and found that not one of the 83 cards was signed (T-113). No testimony has

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* P. S. 63

38 ED	0 - 20%	Black & Puerto Rican
39 ED	20 - 40%	Black & Puerto Rican
40 ED	0 - 20%	Black & Puerto Rican
48 ED	20 - 40%	Black & Puerto Rican

P. S. 134

12 ED	0 - 20%	Black & Puerto Rican
13 ED	0 - 60%	Black & Puerto Rican

been produced to indicate that even one person from among the 83 parent voters appeared, attempted to vote and was denied the opportunity to vote.

Emmanuel Presbyterian Church, a polling site servicing only one election district (30th E.D.) opened late. Although it was estimated that approximately twenty-five (T.330) voters appeared prior to the opening of this particular polling site and were told to return later in the day, plaintiffs failed to produce any voter who was denied the right to vote because of such late opening. In fact, plaintiffs' sole witness who testified that he was not permitted to vote at Emanuel Church in the early hours of the day, returned later in the day and voted (T.475).

Based upon the foregoing, the conclusion reached by the Court below that delays in the opening of polls related almost exclusively to polls servicing minority voters (A.170-171) is clearly erroneous and the further conclusion that many of these voters were denied the opportunity to vote is not supported by the evidence.

The court below found that bi-lingual materials were not always readily available at the polls and the

effect of the absence of such materials was felt by those voters who spoke, read or understood little or no English.

The testimony shows that the following materials were prepared and distributed by the defendant Board of Elections. a) material describing how to vote prepared in Chinese, Spanish, Japanese, French, Italian and Yiddish (T-646) (A-277) b) posters in the several languages for each election district containing instructions on how the ballots were to be cast (T-649) and c) bi-lingual sample ballots (T 661-2), (A.281)

In addition thereto every voter in District One, as well as throughout the City was sent a brochure, prepared by defendants, which among other things told him the location of his polling place on election day and information on how to vote in both Spanish and English and a profile of the candidates in both Spanish and English (T-658-9)(A.275).

The opinion below states that several parents of District One children were improperly instructed to vote for District Two candidates at a school which

contained polls for both districts. The conclusion drawn from this was that this was discriminatory and resulted in the disenfranchisement of these parents. (A.172)

The problems faced by the defendant Board of Elections in regard to overlapping polling places is testified to in detail (T.678-9), by the director of the overall election. Those overlapping polling places were necessitated, not by any racial or ethnic consideration, but solely due to geographic problems. The record shows that this occurred in predominately white election districts as well as in minority election districts e.g. P.S. 19 (A.249).

Moreover, the only testimony in this regard was hearsay (T.226-230), the witness testified that the problem was cleared up by 11:00 A.M. (T.229) and there was no testimony that any of the voters did in fact cast their ballots for District Two Candidates.

The use of computer pint outs in lieu of the regular buff cards were found to have a discriminatory effect on minority voters. (A.172-175).

The Court should have taken judicial notice of the fact that a State primary election was being held almost concurrently with the School Board elections, and that the buff-cards which are used for all regularly registered voters, were being used in that primary election and were unavailable for the election to the community school boards. This fact was alluded to in the testimony (T-645). Buff-cards for parent voters, who were not regularly registered voters, were available because they were not required in the state primary election and were intended for the exclusive use in the May 1, School Board Elections.

The major problem imposed by the use of computer print-outs as opposed to regular buff-cards was the question of indentification. The Court concluded this to be discriminatory even though the decision states that wherever indentification was required it was required of all voters regardless of race or ethnicity (A.173).

Section 198 of the Election Law of the State of New York imposes the duty upon the inspectors of election to determine the identity of the voter. The method prescribed therein is by a comparison of the

voters signature, at the time he seeks to vote, with a sample signature on the voters buff-card. It must be remembered that due to circumstances beyond the control of defendants the buff-cards were not available in this election and computer print-put sheets bearing the names and addresses of the voters were, in cases of regularly registered voters, used in their place. A diligent and conscientious inspector in an effort to carry out the mandate requiring identification of voters, would require some proof that the person who presented himself at the polls to vote, is, in fact, the duly registered voter whose name and address appears in the print-out. There was no evidence presented that identification was required of parent-voters, who did have the benefit of the buff card. When identification was required by election inspectors it was required of regularly registered voters, whose signature could not be compared due to the absence of his buff-card.

In discussing the use of buff-cards (wherein the inspector need only compare the voters signature) as opposed to the use of computer print-outs the Court below indicated that the use of buff-cards was a superior procedure, or at least did not lead to the

alleged irregularities caused by the print-outs.(A. 172, 185A). The irregularities caused by the use of the print-outs, the Court concluded, had a racially discriminatory impact upon blacks, Puerto Ricans and Chinese. This conclusion appears to be illogical in view of the fact that a majority of those voting as parent-voters and thus getting the benefit of the buff cards were blacks, Puerto Ricans and Chinese, while a majority of the regularly registered voters (and using the print outs) were white. (A.164-165). This factor would tend to have a greater negative impact on the white voters in the District than on the minority voters.[6]

The opinion below further concludes that "[i]n certain election districts in which the populace was predominantly white, certain persons whose names did not appear on the print-out but whose names were known to the inspector, were allowed to vote, and a notation to this effect was made on the opinion p. 22 print-out." (A.174).

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6 One aspect of this phenomenon was recognized by the court below in footnote 26 (A 174).

Appellants have searched the record and have been unable to find any evidence to support this finding of fact.

Another significant irregularity that the Court below found to have had a racially discriminatory effect was the alleged inadequacy in the instruction and training of election inspectors and interpreters (A. 175).

The District Court's finding that there were no training sessions for inspectors is not supported by the evidence.

The sole witness to testify as to training of inspectors called by plaintiffs testified that she had been an inspector at the polling site located in the Emmanuel Presbyterian Church. She testified that she had not received instructions to appear for the usual training sessions prior to the election (T-443). She further testified that on the date of the election she appeared at the wrong polling (T-430). Cross examination further revealed that this inspector was clearly partisan toward the slate identified as supporting Luis Fuentes and favored by the plaintiff, Coalition. (T-433-4, 438-440). This was the credible testimony upon which the District Court found that no training sessions were conducted for inspectors.

Additionally, defendants' witness testified that each inspector was called down to the Board of Elections for training and instructions (T. 715).

The District Court, in its decision, attempts to strengthen its argument regarding training of inspectors by pointing to alleged contradictory instructions sent to them by the Board of Elections. (A. 176).

Prior to the election special instructions were sent to each inspector who was to serve in the community school board election of May 1 (A. 273). An additional set of instructions was included in the kit sent to each election district. These instructions included an inventory of supplies, procedures to be followed before the opening of the polls, while the polls were open, and after the closing of the polls, as well as setting forth certain pertinent provisions of the State Election Law (A. 279). These two sets of instructions are in no way inconsistent but rather the instructions sent in the mail (A. 273) supplement the standard instructions provided in the kit (A. 279).

In regard to the conduct and training of interpreters, it should be noted that the interpreters were hired by the District Superintendent (Mr. Luis Fuentes,

in District One) (T-654). The record is replete with evidence that the interpreters who were selected were engaged in partisan activities on behalf of the slate supported by plaintiffs and were constantly electioneering for their cause. The aforementioned activities on behalf of the interpreters were some of the major causes for confusion and delay on the day of the election. (T-600-602, 632-633, 635-636, 554-556, 529).

Further testimony reveals that where the interpreters refrained from partisanship and electioneering their aid was invaluable in assisting the non-English speaking voters in the exercise of their franchise (T-490, 502, 506, 508, 519).

(b)

Conduct which was not on its face illegal or irregular but which had a discriminatory impact on the voting rights of minority voters was the second broad category that the Court below found.

The District Court concluded that the changes in election districts (E D) and polling sites between the general elections in November, 1972 and the school board elections on May 1, 1973 were "wholesale changes *** in areas servicing predominantly minority voters

(A-178). Conversely, the Court found that the predominantly white election districts and polling sites remained unchanged except in one or two minor instances (A. 178-180).

There were seventy-two (72) ED's (A-249) and thirty-three (33) polling sites (A-249) within District One for the May 1, 1973 school board election. In order to better understand the actual changes that occurred in the ED's and polling places prior to the election in question the ED's may be viewed in three categories, based upon racial figures taken from the United States Bureau of the Census and the New York Board of Elections[7].

I. Predominantly white ED's- which are 0-40% black and Puerto Rican.

II. Predominantly minority ED's- which are 60-100% black and Puerto Rican.

III. Mixed ED's- which are 40-60% black and Puerto Rican and therefore uncertain as to which, if any, ethnic group is in the majority.

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7 The figures cited for purposes of this aspect of appellants' argument are contained in (A.249).

The following predominantly white ED's were changed (A. 249)

(1) 46 ED	63 Assembly District
(2) 35B ED	64 " "
(3) 39 ED	63 " "
(4) 48 ED	63 " "
(5) 59 ED	63 " "
(6) 53B ED	63 " "
(7) 60 ED	63 " "
(8) 51 ED	63 " "

The following predominantly minority ED's were changed (A. 249)

(1) 21 ED	63 Assembly District
(2) 26 ED	63 " "
(3) 54 ED	63 " "
(4) 55 ED	63 " "
(5) 31 ED	63 " "
(6) 32 ED	63 " "
(7) 56 ED	63 " "
(8) 27 ED	63 " "
(9) 28 ED	63 " "
(10) 15 ED	63 " "
(11) 50 ED	63 " "
(12) 23 ED	63 " "
(13) 24 ED	63 " "

The following mixed ED's were changed (A. 249)

(1) 15B ED	62 Assembly District
(2) 13B ED	62 " "
(3) 36 ED	63 " "
(4) 58 ED	63 " "
(5) 34 ED	63 " "
(6) 18 ED	63 " "
(7) 52 ED	63 " "
(8) 14 ED	63 " "
(9) 57 ED	63 " "

These figures demonstrate that the District Court's findings as to "wholesale changes" in ED's servicing predominantly minority voters was clearly unsupported. Changes in ED's were made throughout District One, in all racial areas. The fact that a somewhat larger number of predominantly minority ED's were effected is consistent with the socio-economic and historical difference in population shifts between both groups. Election districts are determined by population (T. 109-111). A significant shift in population will cause a resulting change in the ED's within that geographic area. The middle income, predominantly white residents have historically been less transient within a geographical area than the lower income, predominantly Puerto Rican residents. This fact has even been borne out by plaintiffs own expert witness (T. 109-111).

Additionally, appellants have demonstrated that State-wide reapportionment required changes in the lines of various assembly districts which in turn required changes in the lines of election districts contained therein (T-142).

The following is a similar racial breakdown in regard to changes of polling sites which occurred in District

One, as a result of the corresponding changes in ED's (A.249):

Changes of polling sites in predominantly White ED's

1)	48 ED	63 Assembly District
2)	60 ED	63 Assembly District
3)	51 ED	63 Assembly District

Changes of polling sites in predominantly black and Puerto Rican ED's.

1)	21 ED	63 Assembly District
2)	55 ED	63 " "
3)	56 ED	63 " "
4)	28 ED	63 " "
5)	15 ED	63 " "
6)	50 ED	63 " "
7)	23 ED	63 " "
8)	24 ED	63 " "

Changes of polling sites mixed ED's:

1)	36 ED	63 Assembly District
2)	58 ED	63 " "
3)	57 ED	63 " "
4)	18 ED	63 " "

Again, these changes occurred throughout District One and effected all racial groups. These changes in polling sites were proportionately consistent with the changes in EDs.

The testimony revealed that the Board of Elections

notified every voter in District One of his ED and the location of his polling place (T 655-657, 658-659), (A.271,275) and the court below recognized this effort (A.179). Despite this fact, the District Court concluded that voters were not effectively notified of these changes (A.186). The only reason given by the Court below for this conclusion was the fact that there was testimony that many voters did not receive such notification (A.179) The further conclusion that this had a discriminatory affect upon blacks, Chinese and Puerto Ricans is not supported by the record, and is based upon the earlier erroneous finding that changes in EDs and polling sites occurred almost exclusively in minority areas. (A. 186).

A further examination of the record will reveal that the District Court's finding as to the location of polling sites and the alleged discriminatory impact of same was clearly erroneous.

The Court below concluded:

(i) that polling sites were placed in

six[8] large, predominantly white middle-income housing projects, with no such corresponding placement in predominantly black and Puerto Rican housing developments (A.181) and

(ii) that this practice had a discriminatory impact upon black and Puerto Rican voters in District One.

One need only refer to the first polling site listed in plaintiff's exhibit 4 (A.249) to discover that a polling site was located within the low income Baruch Houses at 294 Delancey Street (22 ED, 63 AD, 60-100% black and Puerto Rican). Moreover, there was a polling site at 170 Ave. C (33ED, 63AD, 0-60% black and Puerto Rican) and in a Settlement House, located at 283 Rivington Street, within a low income housing development (21ED, 63AD, 60-100% black and Puerto Rican).

It is also important to note in this regard that with the exception of the buildings located at

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[8] (A.181) 455 F.D.R. Drive, 475 FDR Drive, 504 Grand St. 383 Grand Street, 77 Columbia St., 175 E. 4th St.

383 Grand Street and 77 Columbia Street, each polling site located within a predominantly white, middle income building serviced more than one ED. Conversely, each polling site located within the predominantly black and Puerto Rican housing developments serviced only one ED, which would naturally have lead to less confusion and crowding.

There was absolutely no showing in the record that the location of these particular polling sites had a racially discriminatory impact. On the contrary, testimony given by plaintiffs own expert witness suggested that this was not racially discriminatory (T.76-79).

The District Court supports its finding that the location of polling sites had a racially discriminatory impact by pointing to the fact that the percentage turnout in election districts located in the six predominantly white buildings was 54.90%, well above the District average of 22.45%(A.181). This legal conclusion is erroneous for at least three reasons:

1. It does not take into account the fact

that historically, middle income whites vote in greater numbers than low income blacks and Puerto Ricans.

2. It does not compare these percentages with those of other school districts nor does it compare them with the percentage turnout of whites in polling sites located within the public schools of District One.

3. Most importantly, it ignores the results of plaintiffs' own study conducted before and after the 1972 general election that 64 or 65% of the whites voted in 1972 throughout District One, as compared to 33% of the Puerto Ricans. (T.40-41) This figure would in fact indicate that the 54.90% turnout in the six polling places in questions was lower than the distict-wide percentage for whites in 1972.

The District Court's conclusion of law that "the disproportionately high turnout at these polling sites leads us to conclude that this practice had a racially discriminatory impact" (A.186) is not only clearly erroneous but is contrary to the evidence presented.

In its decision below the Court states that the total impact of the scattered and isolated incidents

of intentional racial discrimination was not substantial (A 187). As to this practice, Appellants would only reiterate their complete and total repugnance to any such actions on the part of their employees or agents, if they did in fact occur.

Appellants would like to comment upon the Court's finding that "certain inspectors instructed Puerto Rican and Chinese voters to mark their ballots so as to render them invalid." (A.181).

Appellants have searched the record and have found no evidence to support this conclusion. There were two witnesses called by the plaintiffs' who testified to this alleged irregularity.

The first testified that the interpreter at the polling site told her to put check marks next to each of her nine choices (T. 477-8). On cross examination this same witness testified that she had received instructions on how to cast her ballot (T.478). Furthermore, there was credible testimony that all ballots which in any way indicated their preference were counted (T. 577), and that the Board of Elections "bent over backwards" to accept ballots as valid when doing the count. (T. 127)

The second witness testified that an inspector told her to sign the ballot on the back (T.480). There was credible testimony that only where there was a clear signature in such a fashion that one could not treat it as anything else on the front of the ballot was it treated as a signature and thus invalid (T.577). In fact, even yellow sample ballots where erroneously used were counted (T.575).

The record also contains some very revealing statistics regarding invalid ballots. Throughout this case plaintiffs have attempted to create the impression that there was mass confusion on election day, voters were being misinformed, inspectors were causing voters to cast their ballots in such a manner as to render them invalid, minority voters were not being assisted and their votes not counted, and that hundreds of voters were being disinfranchised.

Statistics relating to the Community School Board Elections held on May 1, 1973 reveal the following: (A. 269)

	District one	Borough of Manhattan	City of New York
Registered Voters	58,923	763,948	3,566,443
Total Vote	13,230	63,349	370,204
% of Registration	*22.45	8.29	10.38
Valid Vote	12,579	60,132	356,629
% of Total	* 95.08	94.92	96.33
Invalid Vote	622	3,165	13,358
% of Total	*4.70	5.00	3.61

Appellants contend that these figures refute the Court's finding that the May 1, 1973 school board election in District One was held in such a manner as to have had a racially discriminatory impact on blacks, Puerto Ricans and Chinese.

The fact that the percentage of voter turnout was more than twice the city-wide average and almost three times the borough-wide average would indicate that a great proportion of the residents of District One were able to exercise their right to vote. Of course, Appellants are mindful of the fact that this statistic does not indicate the racial composition of those who actually voted on May 1, 1973. It is offered however for the purpose of demonstrating the success on the part of defendants in their efforts to enfranchise as many residents of District One as possible. The record below demonstrates that these efforts were geared primarily toward minority parents of public school children (A.167).

The figures relating to valid and invalid ballots also refute the finding by the District Court that the May 1 election was held in a racially discriminatory manner.

The fact that the percentage of invalid ballots was lower than the borough-wide average and slighter higher than the city-wide average would indicate that there were no greater problems in District One in regard to the electorate's understanding of the ballot and the manner of casting same than in any other community school district within the City of New York. For example, the percentage of invalid ballots cast in District 4 [9] was much greater (7.82%) than in District One. (T.580), (A.269). This was likewise true with District 5, which encompasses the predominantly black and Hispanic community of Harlem and which had an invalid percentage of 6.28 (T.580) (A.269)[10]

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[9] District 4 encompasses the upper west side of Manhattan is predominantly white, and is considered a politically sophisticated area.

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[10] See also Plaintiffs' exhibit 5 (A.231) which contains statistics on invalid ballots and which indicates only one ED (3rd ED) having a significantly large percentage of invalid ballots. It is interesting to note that the 3rd ED is a predominantly white ED having 20-40% black and Puerto Rican (A. 249)

(2)

Assuming arguendo that the record below indicates that there were some instances of racial discrimination, the degree of proof adduced was not sufficient to support the drastic relief of the setting aside of a completed election.

The setting aside of an election is an extraordinary remedy which the Court should grant only under the most extraordinary circumstances. Smith v. Paris 257 F. Supp. 901, 905 (N.D. Ala., 1966).

The testimony, at the most, indicates that the election in District One, like any election, contained certain irregularities.

Mere irregularities in any election are not subject to the scrutiny of the Federal Courts. Powell v. Power, 436 F. 2d 84 (2nd Cir., 1970); Pettingill v. Putnam Co. R-1 School District, 472 F. 2d 121 (8th Cir., 1973).

In Powell v. Power, this Court stated in part as follows:

> "*** the due process clause and article I, section 2 offer no guarantee against errors in the administration of an election. New York Election Law §§145, 330(2) provide a method for correcting such errors as are made, and the plaintiffs do not contest the fairness and adequacy of that remedy. And while article 1, section 2 may outlaw purposeful tampering by state officials with the conduct of a primary election for a Congressional seat,

> United States v. Classic, 31e U.S. 299, 61 S. Ct. 1031, 85 L.Ed. 1368 (1941), we cannot believe that the framers of our constitution were so hypersensitive to ordinary human frailities as to lay down an unrealistic requirement that elections be free of any error." (emphasis added)

State laws provide ample remedies for the correction of irregularities in an election.

The Federal Courts will only intercede upon a clear and unequivocal demonstration of racial discrimination. Gremillion v. Rinando, 325 F. Supp. 375 (E.D. La., 1971); Gray v. Main, 309 F. Supp. 201, 215 (N.D. Ala., 1968).

Since it has been shown that the irregularities complained of occurred generally throughout the district, in White areas as well as Puerto Rican, black and Chinese areas and as well as in all the school districts in the city, these irregularities could not be said to be discriminatory.

Even showing some evidence of racial discrimination it was insufficient to annul a completed election.

One of the earlier cases in this area, and still the accepted standard is Bell v. Southwell, 376 F. 2d

659 (5th Cir., 1967). In Bell the Court stated:

> "Drastic, if not staggering, as is the Federal voiding of a State election, and therefore a form of relief to be guardedly exercised, this Court in Hammer v. Campbell, 5 Cir., 1966, 358 F. 2d 215, cert. denied, 1966, 385 U.S. 851, 87 S. Ct. 65, 17 L.Ed. 2d 79, expressly recognized the existence of this power. Of course as that opinion emphasizes, not every unconstitutional racial discrimination necessarily permits or requires a retrospective voiding of the election." (emphasis added)

The Court further indicated that in order to set aside a completed election there must be a showing of "gross, unsophisticated, significant and obvious racial discrimination" See also: Perkins v. Matthews, 301 F. Supp. 565 (S.D. Miss., 1969), reversed and remanded 400 U.S. 379 (1971); 336 F. Supp. 6 (1971) Hamer v. Campbell, 358 F. 2d 215 (5th Cir., 1966), cert den. 385 U.S. 851; Hubbard v. Ammerman, 465 F. 2d 1169 (5th Cir., 1972); Hammer v. Ely 410 F. 2d 152 (5th Cir., 1969) cert den. 396 U.S. 942, 1969.

In Bell, supra, the situation was one where clear, unequivocal discrimination was demonstrated in that (1) voting lists for the election were segregated on the basis of race, (2) voting booths were segregated according to race; one booth being for white males,

another for white females and a thirdfor Negroes, (3) a number of qualified Negro voters were denied their right to cast their ballots in the booth designated for white women, (4) election officials barred representatives of the Negro candidate from viewing the voting, while another Negro was physically struck by an election official, etc.

In the May 1, 1973 election in District One there was a total failure to show "gross, spectacular, and wholly indefensible discrimination" and, the decision below so states (A. 188). Absent such showing the Court should not have voided the election.

Instead of the accepted standard set forth in Bell, the Court below has adopted the standard set forth in the recent en banc Fifth Circuit opinion. Toney v. White F 2d , 42 L.W. 2331 (72-3307, December 3, 1973) which requires only a showing of racial discrimination of such a substantial nature as possibly to have affected the outcome of the election. The District Court's reliance on such a standard to set aside a completed election is misplaced. Firstly, there was no clear showing in the record that the alleged discrimination affected the outcome of the election and secondly, Toney involved only pre-election discriminatory procedures, not instances of discrimination

occurring on election day as was the case in Bell, supra.

In the opinion below (A. 189) the Court declares that "in this case plaintiffs pre-election diligence is unassailable." Appellants submit this is not supported by the record. What plaintiffs sought prior to the election was a bilingual registration period, the use of bilingual nominating petitions and the use of bilingual ballots and materials on election day, as well as the availability of Spanish and Chinese interpreters. The record below indicates that these measures were successfully met by the defendants. None of these elements were found to be the cause of any substantial discrimination. With the exception of a challenge by another group to the use of the computer printouts in lieu of buff cards, the facts regarding changes in district lines as well as the locations of polling places were all known to plaintiffs for a significant time preceding the election, yet no efforts on their part were made to challenge this prior to the election. As to these element plaintiffs totally failed to exercise any pre-election diligence.

Regarding those elements where pre-election diligence was said to have occurred, the Court, in its opinion below, commended the efforts of defendants in successfully meeting these requirements (A. 167).

The court below did find that the exact type of assistance to be given by the interpreters at the polls

was unclear and somewhat confused. This confusion was understandable in view of the fact that the Lopez Order[11] provided only that at least one person who was bilingual in English and Spanish or English and Chinese act as an interpreter at each school polling site where there were, respectively, more than 5% Puerto Rican or more than 5% Chinese students enrolled.

In Torres v. Sachs, 73 Civ 3921, an action commenced in September, 1973, some four months after the May 1 school board election and pertaining to the upcoming general elections, the provisions for interpreters' assistance at the polls was clarified and spelled out in greater detail than in the Lopez Order:

> "Said translators [Spanish and English speaking persons] shall be permitted to approach Spanish speaking voters for the purpose of offering assistance and shall be permitted to go behind the guard-rails for purposes of providing assistance." (A. 158)

The above cited provision was absent from the Lopez Order and thereby contributed to the confusion regarding the type of assistance to be provided by the interpreters in the May 1 school board election.

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11. Lopez v. Dinkins, 73 Civ. 695 (S.D.N.Y., 1973, Stewart, J.)

Conclusion

The decision of the District Court should be reversed; the Community School Board elected on May 1, 1973, be reinstated and the order directing the holding of a new election in District One should be vacated.

March 18, 1972

Respectfully submitted,

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DUE AND TIMELY SERVICE OF 3 COPIES OF THE WITHIN Appellants Brief, IS HEREBY ADMITTED THIS 19th DAY OF March, 1974

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Plaintiffs-Appellees

DUE AND TIMELY SERVICE OF 3 COPIES OF THE WITHIN Appellants Brief, IS HEREBY ADMITTED THIS 19th DAY OF March 19, 1974

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